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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**
8

9 WILLIAM MITCHELL BELL,)

10 Petitioner,)

3:14-cv-00028-LRH-WGC

11 vs.)

ORDER

12 ISIDRO BACA, *et al.*,)

13 Respondents.)
14 _____/

15 This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254,
16 by a Nevada state prisoner.

17 The petition in the instant action challenges petitioner's state conviction for second degree
18 murder in the Eighth Judicial District Court for the State of Nevada, Case No. C221724. Petitioner
19 previously challenged the same conviction in this Court, filed under case number 3:11-cv-00741-
20 LRH-WGC. The petition in case number 3:11-cv-00741-LRH-WGC, which raised the same issues
21 asserted in the instant petition, was dismissed as untimely by order filed June 8, 2012. (ECF No. 16
22 in 3:11-cv-00741-LRH-WGC). Judgment was entered that same date. (ECF No. 17 in 3:11-cv-
23 00741-LRH-WGC). Petitioner appealed. By order filed November 8, 2012, the United States Court
24 of Appeals for the Ninth Circuit denied petitioner's application for a certificate of appealability.
25 (ECF No. 25 in 3:11-cv-00741-LRH-WGC).

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1 “Before a second or successive application permitted by this section is filed in the district
2 court, the applicant shall move in the appropriate court of appeals for an order authorizing the district
3 court to consider the application.” 28 U.S.C. § 2244(b)(3)(A). Pursuant to 28 U.S.C. § 2244(b)(1),
4 “[a] claim presented in a second or successive habeas corpus application under section 2254 that was
5 presented in a prior petition shall be dismissed.” In the prior habeas case in which petitioner
6 challenged his conviction for second degree murder, the Court dismissed the petition with prejudice
7 as untimely. (ECF No. 16 in 3:11-cv-00741-LRH-WGC). Where a petition is dismissed with
8 prejudice as untimely, the dismissal constitutes a disposition on the merits and renders a subsequent
9 petition successive for purposes of 28 U.S.C. § 2244(b). *McNabb v. Yates*, 576 F.3d 1028, 1029-30
10 (9th Cir. 2009); *Henderson v. Lampert*, 396 F.3d 1049, 1053 (9th Cir. 2005). The prior habeas corpus
11 petition was dismissed with prejudice as untimely, and the instant habeas petition asserts the same
12 claims as the prior petition. Moreover, in 3:11-cv-00741-LRH-WGC, this Court considered and
13 rejected the same claims of actual innocence and mental incapacity that petitioner asserts in the
14 present petition. The instant petition is a successive petition, which requires petitioner to seek and
15 obtain leave of the Ninth Circuit Court of Appeal to pursue. *See* 28 U.S.C. § 2244(b)(3) *et seq.*
16 Petitioner has not presented this Court with proof that he has obtained leave to file a successive
17 petition from the Ninth Circuit Court of Appeals. Therefore, the instant petition will be dismissed as
18 successive.

19 In order to proceed with any appeal, petitioner must receive a certificate of appealability.
20 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-
21 951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir. 2001). District
22 courts are required to rule on the certificate of appealability in the order disposing of a proceeding
23 adversely to the petitioner or movant, rather than waiting for a notice of appeal and request for
24 certificate of appealability to be filed. Rule 11(a) of the Rules Governing Section 2254 and 2255
25 Cases. Generally, a petitioner must make “a substantial showing of the denial of a constitutional
26 right” to warrant a certificate of appealability. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S.


1 473, 483-84 (2000). “The petitioner must demonstrate that reasonable jurists would find the district
2 court's assessment of the constitutional claims debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at
3 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the
4 issues are debatable among jurists of reason; that a court could resolve the issues differently; or that
5 the questions are adequate to deserve encouragement to proceed further. *Id.* In this case, no
6 reasonable jurist would find this Court’s dismissal of the petition debatable or wrong. The Court
7 therefore denies petitioner a certificate of appealability.

8 **IT IS THEREFORE ORDERED** that this action is **DISMISSED WITHOUT**
9 **PREJUDICE** as a successive petition.

10 **IT IS FURTHER ORDERED** that petitioner is **DENIED A CERTIFICATE OF**
11 **APPEALABILITY.**

12 **IT IS FURTHER ORDERED** that the Clerk **SHALL ENTER JUDGMENT** accordingly.

13 Dated this 21st day of April, 2014.

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17 LARRY R. HICKS
18 UNITED STATES DISTRICT JUDGE
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